

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 17 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0354-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
KEVIN G. WILLIAMS,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-61761

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Kevin G. Williams

Florence  
In Propria Persona

K E L L Y, Judge.

¶1 After a jury trial, petitioner Kevin Williams was convicted of four counts of sexual conduct with a minor under the age of fifteen. The trial court sentenced him in August 1999 to consecutive, presumptive prison terms of twenty years on each count. This court affirmed the convictions and the sentences on appeal. *State v. Williams*, No. 2 CA-CR 99-0383 (memorandum decision filed Aug. 30, 2001). Williams then sought

post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court denied relief after an evidentiary hearing. This court denied relief on review. *State v. Williams*, No. 2 CA-CR 2007-0097 (memorandum decision filed Sept. 21, 2007). Williams initiated a second post-conviction proceeding, filing a notice of post-conviction relief and a petition, a supplemental petition, a motion for clarification, and a motion to vacate the restitution order. Appointed counsel filed a notice avowing he had reviewed the record and found no issues to raise and a memorandum regarding sentencing issues Williams had raised. The trial court denied Williams's requests for relief in multiple orders, finding Williams's sentences lawful. This petition for review followed. Absent the trial court's clear abuse of its discretion in determining whether post-conviction relief is warranted, we will not disturb its ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In his petition for review and supplemental petition for review, Williams reiterates his challenges to the sentences imposed, claiming the consecutive terms were unlawful because they violated the prohibition against double punishment. Relying on this court's decision in *State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989), he asserts the trial court lacked jurisdiction to impose the unlawful sentence. Williams cursorily asserts that the trial court erred in denying relief, or at least in denying an evidentiary hearing, on his claim that the trial court had sentenced him to an illegal prison term in violation of the Eighth Amendment to the United States Constitution and his related claim of ineffective assistance of counsel. He maintains, too, that he was entitled to relief on his claim that his due process rights were violated, because he was not given a restitution hearing.

¶3 Williams’s claims are clearly precluded. *See* Ariz. R. Crim. P. 32.2. To the extent he suggests the illegality of his sentences is a claim he can raise at any time because it is jurisdictional in nature, he is mistaken. Even assuming *arguendo* the sentences were unlawful, that does not mean the trial court lacked subject matter jurisdiction to impose them. In *State v. Bryant*, 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008), this court found the term “jurisdiction” had been used “imprecisely” in *Vargas-Burgos*. The purported illegality of Williams’s sentence is not an issue related to subject matter jurisdiction but rather a claim of error that can be forfeited.

¶4 Similarly, we reject Williams’s suggestion that an illegal sentence, constituting fundamental error, is a claim of sufficient constitutional magnitude that cannot be waived implicitly but requires a knowing, voluntary and intelligent waiver. Although an illegal sentence is fundamental error, *see State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002), a defendant is not entitled to challenge the sentence for the first time in a successive petition for post-conviction relief. *See Swoopes*, 216 Ariz. 390, ¶ 41, 166 P.3d at 958. Rather, such error, which is cognizable under Rule 32.1(c), is not excepted from the rule of preclusion, *see* Rule 32.2(b), Ariz. R. Crim. P., and is not a claim of sufficient constitutional magnitude that can only be waived if that waiver is knowing, voluntary and intelligent. *Swoopes*, 216 Ariz. 390, ¶ 41, 166 P.3d at 958.

¶5 Although the trial court denied relief because it repeatedly found the sentences were lawful, we cannot say the trial court abused its discretion when it summarily dismissed Williams’s petition for post-conviction relief because his claims

were clearly precluded. On review, Williams has not persuaded us otherwise. Therefore, although we grant Williams's petition for review, we deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge